



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**APPELLATE SIDE**

**CRIMINAL APPEAL NO. 94 OF 2001**

**(From Original Conviction and Sentence in Criminal (Traffic) Case  
No. 1293 of 2001 of the Senior Principal Magistrate's Court at  
Machakos: J. K. Karanja Esq. on 23.5.2001)**

**10 LAWRENCE MUSYOKA WAMBUA :::::::::::::::::::: APPELLANT**

**VERSUS**

**REPUBLIC :::::::::::::::::::: RESPONDENT**

**Coram: J. W. Mwera J.  
Kilukumi Advocate for Appellant  
Orinda State Counsel for Respondent  
C.C. Muli**

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**RULING**

20 The applicant by notice of motion dated 29.6.2001 prayed this court under S. 65(2) of the Constitution of Kenya and S. 261 Criminal Procedure Code to stay proceedings in a Machakos Senior Resident Magistrate's Traffic Case 1293/2001 awaiting outcome of Cr.A. 94/2001 where Mr. Kilukumi said, his client had appealed against a refusal there to refer a matter of a constitutional question to the Hon. Chief Justice. That the Chief Justice would have in turn appoint a 3-judge bench to determine whether the Kenya Police were competent to prosecute traffic cases in Kenya particularly that that department did not state in charge sheets it filed, that it was acting on behalf of the Attorney General. This court was left with the impression that what falls to be resolved in a constitution ruling, is whether the power the Attorney General exercises under S.26 Constitution spreads to the Kenya Police who prosecute cases in all subordinate courts in Kenya. That if there is no constitutional cover for them then police prosecutions are unlawful, unconstitutional and bad in every respect. Mr. Kilukumi also hinted at another point questioning whether the Kenya Police should be an agency to investigate crime as well as prosecute. That arising from criminal proceedings against the applicant, Criminal Application No. 389/2001 had already reached the Hon. The Chief Justice and he was already 10 considering directions. Therefore, the court was further told, since matters raised in that criminal application were more or less the same as the ones put forth in the traffic case, Mr. Kilukumi was at a loss why the magistrate in the lower court acceded to a reference in the criminal matter while he declined to give similar orders in the traffic case. That for failing, refusing or otherwise making reference in the traffic case, the applicant had appealed to this court and on that account traffic case proceedings should be put on hold.

The Learned State Counsel did not agree with Mr. Kilukumi. He held the view that how a magistrate went about the criminal application did not necessarily find application of a similar matter in traffic proceedings. That this application was wide, vague and meant to prohibit all prosecutions generally and particularly against the applicant – a state of things that can only be termed untenable if not absurd. In essence the applicant desired that in both matters in the lower court – criminal or traffic, since he had

allowed the former to go to the High Court under S. 67(1) Constitution, similarly the like question in the latter, had to be referred to the High Court by the same trial magistrate below. But that he did not so act, this appeal lies and it has overwhelming chances of success. That section of the Constitution says.

***“67.(1) Where a question as to the interpretation of this Constitution arises in proceedings in a subordinate court and the court is of the opinion that the question involves a substantial question of law, the court may, and shall if a party to the proceedings so request, refer the question to the High Court (2) ..... (4) .”***

If this court heard Mr. Kilukumi well, he said that the Learned Trial Magistrate acted inconsistently in making a reference in the criminal case while declining to do so on same grounds in the traffic matter. Or if we can confine ourselves to the traffic matter only, the Learned Trial Magistrate ought to have made a reference under the above legal provision and that the applicant had right to appeal here (See S.67(4) Constitution).

Usually it is not a matter of ease and clarity for a court to which an appeal is made to rule right away and in all matters of appeal before hearing the appeal, whether it has merits or not – or as it is termed, whether it is an arguable appeal or not. But some appeals can be quite clear one way or the other. In this one if the application of S.67(1) (above) falls to be argued, this court can only but say at this juncture that that provision of the law has elements of discretion or option because the Learned Trial Magistrate before whom proceedings are, must form an opinion before making a reference to the High Court for interpretation of questions of a constitutional nature. He is not bound to make a reference as a matter of course. But be that as it may. The traffic case proceedings remain on hold. May the appeal herein be fixed for hearing in 30 days from the date hereof. However to be precise S.65(2) of the Constitution and S. 261 Criminal Procedure Code under which this application was brought, do not apply or were not amplified well enough to demonstrate their applicability in this case at this point.

Orders accordingly

Delivered on 23rd October, 2001.

**J. W. MWERA**

**JUDGE**